Supreme Court, U.S.
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No. 96-48

In The

Supreme Court of the United States

October Term, 1995

LAKE AT LAS VEGAS INVESTORS GROUP, INC.,

Petitioner,

v.

BOTABA REALTY COMPANY, BSF PARTNERS, SID R. BASS, ROBERT M. BASS and LEE M. BASS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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8 pp

TABLE OF CONTENTS

Page

I. Summary Of Argument 1

II. Argument 1

A. This Case Presents A Narrow Issue: The Scope Of The Fed. R. Civ. P. 41 (a)(1)(a) Two Dismissal Rule 1

B. The Issue Presented By Petitioner Was Neither Decided Nor Addressed Below 2

C. Independent State Law Grounds Support The Decision Below 3

III. Conclusion 5

TABLE OF AUTHORITIES

Page

CASES

Bernhard v. Bank of America Nat. Trust & Sav. Ass'n., 19 Cal.2d 807, 122 P.2d 892 (1942) 3, 4

City of Raleigh v. College Campus Apartments, Inc., 94 N.C. App. 280, 380 S.E.2d 163 (1989), *aff'd.* 326 N.C. 360, 388 S.E.2d 768 (1990) 2

City of Reno v. Nevada First Thrift, 100 Nev. 483, 686 P.2d 231 (1984) 5

Horvath v. Gladstone, 97 Nev. 594, 637 P.2d 531 (1981) 4

Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu, 933 F.2d 724 (9th Cir. 1991), *cert. denied*, 503 U.S. 920 (1992) 1, 2

Landex, Inc. v. State ex rel. List, 94 Nev. 469, 582 P.2d 786 (1978) 5

Manning v. South Carolina Dept. of Hwy. and Public Transp., 914 F.2d 44 (4th Cir. 1990) 2

Paradise Palms Community Association v. Paradise Homes, 89 Nev. 27, 505 P.2d 596, *cert. denied*, 414 U.S. 865 (1973) 3, 4

Pulley v. Preferred Risk Mut. Ins. Co., 111 Nev. Adv. Op. 89, 897 P.2d 1101 (1995) 5

University of Nevada v. Tarkanian, 110 Nev. 581, 879 P.2d 1180 (1994) 4, 5

STATUTE

Fed. R. Civ. P. 41 (a)(1)(a) 1, 2, 3

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

I. Summary Of Argument.

The Court should deny the petition for writ of certiorari of Lake at Las Vegas Investors Group, Inc. for three reasons: (1) the petition presents an infrequently raised issue, the res judicata effect of a second dismissal under the two dismissal rule of Fed. R. Civ. P. 41(a)(1)(a); (2) the purported issue set forth in the petition was neither addressed nor decided by the court of appeals; and (3) independent state law grounds support the decision of the court of appeals. As a result, this case does not present a proper vehicle for determination of the policy issue raised by the petition.

II. Argument.

A. This Case Presents A Narrow Issue: The Scope Of The Fed. R. Civ. P. 41 (a)(1)(a) Two Dismissal Rule.

Although petitioner attempts to characterize this case as broadly addressing whether state or federal law should apply to determine the res judicata effect of a prior judgment in a diversity case, the actual issue is much more limited. In *Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu*, 933 F.2d 724 (9th Cir. 1991), *cert. denied*, 503 U.S. 920 (1992), the court of appeals considered the scope of the two dismissal provision of Fed. R.

Civ. P. 41(a)(1)(a), stating, "The question is what relationship, if any, is required between the party twice dismissed and a party seeking to enforce the bar against the plaintiff."

In answering that question, the court cited a Fourth Circuit case discussing the effect of a second dismissal ***in a South Carolina state court*** under that state's identical rule, *Manning v. South Carolina Dept. of Hwy. and Public Transp.*, 914 F.2d 44 (4th Cir. 1990), and a North Carolina Court of Appeals decision discussing that state's identical rule, *City of Raleigh v. College Campus Apartments, Inc.*, 94 N.C. App. 280, 380 S.E.2d 163 (1989), *aff'd.* 326 N.C. 360, 388 S.E.2d 768 (1990). The court cited no decisions discussing the effects of a second dismissal under the federal rule, much less court of appeals decisions addressing the res judicata effect of a second dismissal or any other final judgment of a federal court in a diversity case.

In the five years since the Ninth Circuit decided *Lake at Las Vegas*, no circuit level published decision has ever cited it. The Ninth Circuit's memorandum decision which gave rise to this petition similarly concerns only the scope of the prior second dismissal under Fed. R. Civ. P. 41(a)(1)(a). It does not cite a decision of any other circuit. Viewed in light of the issue actually decided below, the "split in the circuits" announced by petitioner recedes into a singular esoteric case.

B. The Issue Presented By Petitioner Was Neither Decided Nor Addressed Below.

The court of appeals memorandum decision as to which the writ is sought does not even purport to address

whether state or federal law should be applied to determine the res judicata effect of judgments rendered by federal courts in diversity cases. Because neither the court of appeals nor the district court considered the issue as to which petitioner seeks certiorari, that issue was not properly framed below. Thus, this case presents an inadequately developed record for deciding the issue.

C. Independent State Law Grounds Support The Decision Below.

Petitioner claims the circuit court erred by applying federal law to determine the parties to which the two dismissal rule of Fed. R. Civ. P. 41(a)(1)(a) applied, asserting, "Nevada law had to be applied and required privity to invoke res judicata." Petition at pp. 4-5, and, "the outcome of the case . . . as decided by a federal court sitting in diversity, is diametrically opposite of the result that would have been reached by a Nevada state Court." *Id.* at p. 6. However, petitioner misapprehends the requirements for application of res judicata under Nevada state law.

Analysis of this issue begins with *Paradise Palms Community Association v. Paradise Homes*, 89 Nev. 27, 505 P.2d 596, *cert. denied*, 414 U.S. 865 (1973). In *Paradise Palms*, the Nevada Supreme Court rejected mutuality of privity as a condition for pleas of prior adjudication, adopting the test first set forth in *Bernhard v. Bank of America Nat. Trust & Sav. Ass'n.*, 19 Cal.2d 807, 122 P.2d 892 (1942), and quoting *Bernhard* as follows:

> In determining the validity of a plea of ***res judicata*** three questions are pertinent: Was the

> issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party ***against*** whom the plea is asserted a party or in privity with a party to the prior adjudication?

505 P.2d at 599. (Emphasis added.) The Nevada Supreme Court then concluded:

> [*Bernhard*] is ***equally*** applicable to the doctrine of collateral estoppel. [Citations omitted.] We approve the *Bernhard* decision for Nevada.

Id. (Emphasis added.) Surely the Ninth Circuit properly concluded the Nevada Supreme Court would not require mutuality of privity for assertion of claim preclusion after citing with approval *Bernhard v. Bank of America Nat. Trust & Sav. Ass'n., supra,* for the proposition that res judicata did not require mutuality of privity, and holding the *Bernhard* case ***equally*** applicable to issue preclusion.

Since *Paradise Palms,* the Nevada Supreme Court has restated the elements of res judicata on numerous occasions, sometimes generally stating, "res judicata precludes parties or their privies from relitigating a cause of action," *e.g., Horvath v. Gladstone,* 97 Nev. 594, 596, 637 P.2d 531, 533 (1981); *University of Nevada v. Tarkanian,* 110 Nev. 581, 598, 879 P.2d 1180, 1190 (1994)[1], then restating the three part test set forth in *Paradise Palms; Horvath,* 97

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[1] Petitioner claims the three part test for res judicata actually applies only to collateral estoppel, or issue preclusion. However, in *Tarkanian,* the court followed its citation of the three part test with a discussion of the differences between claim preclusion and issue preclusion. No attempt was made to divorce the three part test from either application of res judicata.

Nev. at 596, 637 P.2d at 533; *Tarkanian*, 110 Nev. at 598, 879 P.2d at 1190; *Pulley v. Preferred Risk Mut. Ins. Co.*, 111 Nev. Adv. Op. 89 at 2-3, 897 P.2d 1101, 1102-03 (1995). *See also, Landex, Inc. v. State ex rel. List*, 94 Nev. 469, 475-76, 582 P.2d 786, 790 (1978); and *City of Reno v. Nevada First Thrift*, 100 Nev. 483, 488, 686 P.2d 231, 234 (1984) (applying the three part test). The third element of that test requires only that the party ***against*** whom the judgment is asserted must have been a party or is privity with a party to the prior litigation. Because petitioner was the plaintiff in the lawsuit at all times before and after the addition of the Botaba defendants, claim preclusion was properly asserted against it.

III. Conclusion.

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

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